SUPREME COURT, U. S.
MAY 8 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term 1966

No. ~~1369~~ 142

PACIFIC SPORTFISHING, INC., A. O. LEAVITT, and F. E. McEWEN,

*Petitioners,*

*vs.*

JUNE E. BERRY, as the personal representative of the ESTATE OF JOHN H. BERRY, Deceased,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

CARL J. SCHUCK,
550 South Flower Street,
Suite 607,
Los Angeles, Calif. 90017,
*Counsel for Petitioners.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

## SUBJECT INDEX


| | Page |
|---|---|
| Citations to Opinions Below | 1 |
| Jurisdiction | 2 |
| Constitutional Provisions and Statutes Involved | 2 |
| Questions Presented | 2 |
| Statement of Facts | 3 |
| Reasons for Granting the Writ | 5 |
| 1. The Judgment Rendered Below Is in Direct Conflict With the Rule as Established in the Fifth Circuit | 5 |
| 2. The Decision Below Is Not in Accord With the Most Recent Applicable Decision of This Court | 6 |
| 3. The Ruling of the Court Below Creates a Unique and Unwarranted Exception to the Established Legal Principles Governing Statutes of Limitation | 9 |
| 4. The Decision Below Misconstrues the Death on the High Seas Act in a Manner Which Raises Important Questions of State and Federal Jurisdiction | 11 |
| Conclusion | 12 |


## INDEX TO APPENDICES


| | |
|---|---|
| Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit | 1 |
| Appendix B. Judgment of Dismissal | 7 |
| Appendix C. Constitutional Provisions and Statutes Involved | 8 |

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Brock v. Superior Court, 29 Cal. 2d 629, 177 P. 2d 273 | 8 |
| Burnett v. N.Y. Cent. RR. Co., 380 U.S. 424, 13 L. Ed. 2d 941 | 6, 7, 8 |
| Costa v. Bonta, 98 Cal. App. 2d 181, 219 P. 2d 478 | 8 |
| D'Aleman v. Pan American World Airways, 259 F. 2d 493 | 12 |
| Dedmon v. Falls Products, Inc., 299 F. 2d 173 | 9 |
| Devlin v. Flying Tiger Lines, Inc., 220 F. Supp. 924 | 12 |
| Gordon v. Reynolds, 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 | 11 |
| Hamrick v. Indianapolis Humane Society, Inc., 273 F. 2d 7, cert. den. 362 U.S. 919, 4 L. Ed. 2d 739 | 9 |
| Higa v. Transocean Airlines, 230 F. 2d 780, Cert. Dism., 352 U.S. 802, 1 L. Ed. 2d 37 | 12 |
| Humboldt Lumber Mfgrs. Ass'n v. Christopherson, 73 Fed. 239 | 11 |
| Kavanagh v. Noble, 332 U.S. 535, 92 L. Ed. 150 | 10 |
| Lillibridge v. Riley, 316 F. 2d 232 | 5, 6 |
| McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 80 L. Ed. 1135 | 8 |
| Summers v. Wallace Hospital, 276 F. 2d 831 | 9, 10 |
| Wood v. Carpenter, 101 U.S. 135, 25 L. Ed. 807 | 9 |

| Miscellaneous | |
|---|---|
| 59 Congessional Record (1920), pp. 4482-4486 | 12 |
| House Report No. 674, 66th Cong. 2d Sess. (1920) | 12 |
| Senate Report No. 216, 66th Cong. 1st Sess. (1919) | 12 |

## Statutes


California Code of Civil Procedure, Sec. 377 ....2, 11
California Code of Civil Procedure, Sec. 396b ....2, 8
California Code of Civil Procedure, Sec. 434 .....2, 8
California Constitution, Art. XXI, Sec. 1 .....2, 11
Death on the High Seas Act, Sec. 1 ..... 12
Georgia Code, Sec. 3-808 ..... 5
Judicial Code, Sec. 1333 ..... 2
Judicial Code, Sec. 1406(a) ..... 2
41 Statutes at Large, p. 537 ..... 2
62 Statutes at Large, p. 937 .....2, 8
63 Statutes at Large, p. 101 ..... 2
United States Code, Title 28, Sec. 1254(1) ..... 2
United States Code, Title 28, Sec. 1333 .....2, 12
United States Code, Title 28, Sec. 1406(a) .....2, 8
United States Code, Title 46, Sec. 761 ..... 12
United States Code, Title 46, Secs. 761-767 ..... 2


## Textbook


Restatement of the Law of Judgments, Sec. 7 ..... 8

IN THE

# Supreme Court of the United States

October Term 1966

No. .....

PACIFIC SPORTFISHING, INC., A. O. LEAVITT, and F. E. MCEWEN,

*Petitioners,*

*vs.*

JUNE E. BERRY, as the personal representative of the ESTATE OF JOHN H. BERRY, Deceased,

*Respondent.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on February 8, 1967.

### Citations to Opinions Below.

*Ninth Circuit.* The opinion of the court below in this case is set forth in Appendix A, *infra*, pp. 1-6; it has not yet been reported.

*District Court.* The judgment of dismissal rendered by the District Court is set forth in Appendix B, *infra*, p. 7; it was not reported.

## Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 8, 1967 (*infra*, Appendix A, pp. 1-6). The jurisdiction of this Court is invoked under 28 U.S. Code, §1254(1).

## Constitutional Provisions and Statutes Involved.

The constitutional provision involved is Section 1 of Article XXI of the California Constitution.

The applicable federal statutes are: The Death on the High Seas Act, 46 U.S. Code §§761-767, 41 Stat. 537 (1920); Section 1333 of the Judicial Code, 28 U.S. Code §1333, 63 Stat. 101 (1949) and Section 1406(a) of the Judicial Code, 28 U.S. Code §1406(a), 62 Stat. 937 (1948).

The applicable California statutes are: California Code of Civil Procedure, §§377, 396b and 434.

The constitutional provisions and statutes involved are set forth below (Appendix C, *infra*, pp. 7-12).

## Questions Presented.

Respondent filed a claim for wrongful death under the Death on the High Seas Act which the District Court dismissed as time barred. Respondent asserts that a prior filing of the claim in a state court tolled the statute of limitations. The questions presented are:

(a) When federal courts have exclusive jurisdiction of particular subject matter does a state court have any jurisdiction of that subject matter?

(b) Does the filing of a claim in a state court having no jurisdiction of the subject matter toll the mandatory limitation period contained in the statute which creates the right and preempts jurisdiction to the federal courts?

(c) Does mere notice of a claim toll a mandatory limitation period regardless of the manner in which that notice is given?

## Statement of Facts.

On July 13, 1962, decedent, John H. Berry, was lost overboard from petitioner's sportfishing boat, "FISHERMAN", in Pacific waters approximately 10 miles off Santa Catalina Island. Respondent, June E. Berry, the wife of deceased, filed a complaint alleging wrongful death in the Superior Court of the State of California on July 11, 1963. Respondent then delayed an additional six months before serving the complaint and summons on petitioner about January 23, 1964. Petitioners answered, denying liability and setting up several affirmative defenses including the prospective filing of a petition for limitation of liability in the United States District Court. That answer was served upon respondents February 5, 1964.

Petitioners filed a Petition for Exoneration from or Limitation of Liability in the United States District Court for the Southern District of California, Central Division, on July 16, 1964 and promptly served a copy upon respondents.

Not until October 23, 1964, did respondent file in the Federal District Court the claim of June E. Berry for wrongful death of John H. Berry. It was not until June 4, 1965, that respondent properly filed any claim on behalf of the personal representative of the deceased as required under the Death on the High Seas Act. This was nearly three years after the date of the death of John H. Berry.

On September 9, 1965, Judge E. Avery Crary of the United States District Court dismissed respondent's claim on the ground that it was barred by the mandatory two-year statute of limitations contained in the Death on the High Seas Act.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. That court reversed and remanded, holding that respondent's filing in the state court within two years of John Berry's death tolled the statute of limitations so that the claim filed in June of 1965 in the Federal Court was not time-barred.

## REASONS FOR GRANTING THE WRIT.

### 1. The Judgment Rendered Below Is in Direct Conflict With the Rule as Established in the Fifth Circuit.

In holding that the filing of a claim in a court without competent jurisdiction tolls the statute of limitations, the Ninth Circuit has taken a position in conflict with the recent holding of the Fifth Circuit in *Lillibridge v. Riley,* 316 F. 2d 232 (5th Cir. 1963).

The *Lillibridge* case involved a malpractice claim brought in a federal Court in Georgia. Diversity of citizenship was asserted as the ground for federal jurisdiction. The action was dismissed for lack of diversity of citizenship. Shortly thereafter, plaintiff established residency in another state and filed the claim a second time. During the pendency of the first action, the applicable Georgia statute of limitations had run. Plaintiff relied upon the Georgia renewal statute to toll the statute, it provides:

> "If a plaintiff shall be non-suited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case; but this privilege of dismissal and renewal shall be exercised only once under this section."
>
> *Georgia Code,* §3-808.

The District Court granted defendant's motion to dismiss ruling that the limitation was not tolled because, in the absence of diversity, the court had no

jurisdiction of the first action. The first action was held a nullity. On plaintiff's appeal, the Fifth Circuit Court of Appeals affirmed, holding that:

> "In order for the Georgia Renewal Statute to prevent the operation of the statute of limitations, the first suit must have been one in which the court had jurisdiction of the parties and of the subject matter."
>
> 316 F. 2d at 233.

This holding that the statute of limitations is not tolled by a filing in a court without jurisdiction even in the face of a statute intended to preserve the plaintiff's claim whenever possible conflicts *a fortiori,* with a holding that filing in a court without jurisdiction when there is no such declared statutory rule cannot toll the statute of limitations. The decision of the Fifth Circuit in the *Lillibridge* case and the decision of the Ninth Circuit in the instant case are in direct and square conflict.

Since the operation of the statutes of limitations has great impact upon litigation throughout the judicial system as well as the instant case, it is imperative that this Court resolve the conflicts existing in the circuits by passing upon this important question.

**2. The Decision Below Is Not in Accord With the Most Recent Applicable Decision of This Court.**

The decision in the instant case not only conflicts with the rule established in another circuit, but it is also inconsistent with the recent expression of this court. The court below relied on *Burnett v. N.Y. Cent. RR. Co.,* 380 U.S. 424, 13 L. Ed. 2d 941 (1965).

That decision neither compels nor lends support to the instant holding, but rather indicates that a contrary result should follow.

The *Burnett* case involved a claim based upon the Federal Employers Liability Act. State Courts have subject matter jurisdiction in such cases, so the claim was properly filed in the Ohio State Courts. However, under Ohio law, proper venue lay only in the county of plaintiff's residence or the county where the injury occurred. Plaintiff was a resident of Kentucky who had been injured in Indiana, thus no Ohio court had proper venue. The state action was dismissed, and a claim was filed in the United States District Court after the period of limitations had run. The District Court dismissed the action as time barred and the Court of Appeals affirmed, but this court reversed holding that:

> ". . . when a plaintiff begins a timely FELA action in a State Court of *competent jurisdiction*, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action." (Emphasis added).
>
> 380 U.S. at 428.

This court reasoned that Congress did not intend the statute of limitations to bar a plaintiff who brings a timely action within a *court of competent jurisdiction.* At page 430 of its opinion, this court cited congressional legislation intended to prevent improper venue from barring suits. There is no evidence nor language of this court which suggests that Congress intended

that a suit lacking the basic jurisdictional element has any validity.

Since venue requirements are based primarily upon considerations of convenience, both California and Federal law provide for waiver or correction of defects in venue. Such defects are not intended to be fatal.

*Brock v. Superior Court,* 29 Cal. 2d 629, 634, 177 P. 2d 273 (1947);

*Calif. Code of Civil Procedure,* §396b;

*Burnett v. N.Y. Cent. RR. Co., supra,* at 430;

28 U.S. Code §1406(a), 62 Stat. 937 (1948).

Jurisdictional requirements, however, are based upon entirely different considerations. Jurisdiction is an essential element in any judicial proceeding. A defect in jurisdiction is not waiverable. The lack of this essential element is fatal regardless of the state of the proceedings at which it is raised.

*Calif. Code of Civil Procedure,* §434;

*Costa v. Bonta,* 98 Cal. App. 2d 181, 182, 219 P. 2d 478 (1950);

*Restatement, Judgments* §7 (1942);

*McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 80 L. Ed. 1135 (1936).

The *Burnett* case *supra,* cannot be read to hold that jurisdiction in the state court is not necessary. It does not support such a theory. On the contrary, it expressly calls for a court of *competent jurisdiction* for an effective tolling of the limitation period.

**3. The Ruling of the Court Below Creates a Unique and Unwarranted Exception to the Established Legal Principles Governing Statutes of Limitation.**

It is long established that statutes of limitation are vital to the stability of society and are favored in law.

*Hamrick v. Indianapolis Humane Society, Inc.*, 273 F. 2d 7, 9 (7th Cir. 1959), *cert. den.* 362 U.S. 919, 4 L. Ed. 2d 739 (1960);

*Wood v. Carpenter*, 101 U.S. 135, 25 L. Ed. 807 (1879).

Their purpose is to press claimants to assert their rights in prompt, proper and orderly fashion. They are designed to eliminate the uncertainties and burdens inherent in the threat of defending against old claims.

*Summers v. Wallace Hospital*, 276 F. 2d 831, 835 (9th Cir. 1960).

They are intended to:

". . . force a litigant to get moving, and to get moving fast—to pursue every avenue of relief promptly, while the evidence is fresh and the witnesses available."

*Dedmon v. Falls Products, Inc.*, 299 F. 2d 173, 178 (5th Cir. 1962).

"An important public policy lies at their foundation. They stimulate to activity and punish negligence."

*Wood v. Carpenter, supra*, at 139.

When a claimant has had the remedy readily available as had respondent in this case, but has failed to avail himself in the ample time allowed, tolling of the

statute contravenes the basic purposes and policies of limitation outlined above.

The rule established by the court below makes mere notice enough to toll a statute. Apparently filing in a tax court or small claims court or even sending a registered letter of notice would be sufficient under that rule. A rule of the nature can only lead to endless litigation as to what constitutes notice sufficient to toll a limitation.

Such a drastic change in the operation of statutes of limitation was improperly made by the court below. Statutes of limitation are to be strictly adhered to and if departures are made, Congress is the proper body to make them.

> ". . . the loss which he now suffers . . . is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. (Citation) Remedies for resulting inequities are to be provided by Congress, not the courts."
>
> *Kavanagh v. Noble,* 332 U.S. 535, 539, 92 L. Ed. 150 (1947).

> "They are statutes of repose designed to promote stability in the affairs of men and avoid the uncertainties and burdens inherent in defending against old claims. This being so, there is good reason for concluding that the legislature should mark out any departure from the basic purpose, as it has done in the case of actions grounded on fraud."
>
> *Summers v. Wallace Hospital, supra,* at 835.

Because statutes of limitations greatly affect the stability of domestic and judicial institutions in this country and because the court below has made a substantial departure from accepted limitations principles which normally require strict adherence, this Court should exercise its power to review the decision.

**4. The Decision Below Misconstrues the Death on the High Seas Act in a Manner Which Raises Important Questions of State and Federal Jurisdiction.**

The court below appears to have ruled that the Superior Court of the State of California had "jurisdiction" in the instant case, at least until petitioner asserted a lack of such jurisdiction. Such is not the case under either state or federal law.

The boundary of the state of California runs along a line three miles from the coast pursuant to constitutional limitation.

*Calif. Const.* Art. XXI §1.

It has been repeatedly held that California's wrongful death statute (Calif. Code of Civil Procedure, §377) has no effect beyond the constitutionally described three mile limit. California state courts are not competent to adjudicate claims arising from death on the high seas.

*Gordon v. Reynolds,* 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 (1960);

See:

*Humboldt Lumber Mfgrs. Ass'n v. Christopherson,* 73 Fed. 239 (9th Cir. 1896).

The court's suggestion that the California courts may have had "jurisdiction" in some broader sense is clear-

ly erroneous as jurisdiction in cases of wrongful death on the high seas, no matter how broadly it is defined, rests *exclusively* in the federal courts.

*Death on the High Seas Act* §1, 46 U.S. Code §761 (1958);

28 U.S. Code §1333 (1949);

*D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2d Cir. 1958);

*Higa v. Transocean Airlines*, 230 F. 2d 780 (9th Cir. 1956), *Cert. Dismissed*, 352 U.S. 802, 1 L. Ed. 2d 37 (1956);

*Devlin v. Flying Tiger Lines, Inc.*, 220 F. Supp. 924 (S.D.N.Y. 1963).

Legislative history makes it clear that congress intended that the jurisdiction be exclusively federal.

H. R. No. 674, 66th Cong. 2d Sess. (1920);
S. Rep. No. 216, 66th Cong. 1st Sess. (1919);
59 Cong. Rec. pp. 4482-4486 (1920).

It is clear that the state court action, being filed in a court without competent jurisdiction, is a nullity. It can neither create nor preserve any rights in respondent. It can have no bearing on the instant litigation.

## Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CARL J. SCHUCK,
*Counsel for Petitioners.*

## APPENDIX A.

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

June E. Berry, etc., Appellant, vs. Pacific Sportfishing, Inc. et al., Appellees. No. 20,474.

[February 8, 1967]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Jertberg, Johnsen and Duniway, Circuit Judges.

Duniway, Circuit Judge:

The sole question presented on this appeal is whether appellant's claim is barred by the statute of limitations. The district court held that it is. We reverse.

Appellant's claim is for the wrongful death of her husband, which occurred on appellee's vessel "Fisherman" on July 13, 1962. On July 11, 1963, appellant filed in the California Superior Court, Los Angeles County, an action against appellees for wrongful death. On February 5, 1964, appellees filed an answer in the state court, but did not assert lack of jurisdiction. Appellees did allege their intention to file, in federal court, a limitation of liability proceeding. On May 8, 1964, a pre-trial conference was held in the state court. Appellees, in their pre-trial statement, did not assert lack of jurisdiction, but again stated their intention to file a limitation proceeding. The statement was made a part of the state judge's pre-trial order. The case was set for trial on October 5, 1964.

On July 16, 1964, appellees, as vessel owners, filed the present action in federal court, seeking limitation of liability. An injunction against prosecution of the state court action issued on July 17, 1964. So far as appears, the state court action is still pending. On October 23, 1964, appellant filed a claim and on September 3, 1965 an amended claim in this action. In the amended claim she recited that her state court action should have been filed in federal court, because death occurred on the high seas, and therefore the federal court has exclusive jurisdiction, 46 U.S.C. §761.

The court entered a judgment dismissing the claim on the ground that it is barred by the statute of limitations. The period of limitation, 46 U.S.C. § 763, is two years. That period ran on July 13, 1964, three days before the present action was commenced by appellees. Admittedly, no action was filed by appellant in federal court within the two year period.

Essentially, appellees' position is that the jurisdiction conferred upon courts of admiralty by the Death on the High Seas Act is exclusive, so that the state court had no jurisdiction, and that therefore the filing and pendency of the state court action can have no effect upon the running of the statute of limitations. We disagree. We think that the rationale of *Burnett v. New York Central R.R. Co.*, 1965, 380 U.S. 424, requires a reversal. There the original action under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq., was filed in an Ohio State Court. However, because of the peculiarities of Ohio law, there was no court in Ohio where venue of the action was proper. Accordingly, the Ohio court dismissed the action on motion of the defendant. Eight days later the plaintiff filed a new ac-

tion, for the same relief, in the Federal District Court for the Southern District of Ohio. That action, however, was filed more than three years after the cause of action accrued (45 U.S.C. § 56). The District Court therefore dismissed it. The Supreme Court reversed. It held: (1) that the Ohio action had been properly "commenced" within the 3-year period; (2) that, although the limitation was established in the same statute which created the right, that limitation could nevertheless be tolled; (3) that the purpose of the limitation statute is to prevent "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," and to relieve courts of "the burden of trying stale claims when a plaintiff has slept on his rights", and that all of those purposes had been served by the filing of the Ohio action. In so holding, the court commented that the plaintiff did not fail to file his action in the federal court because he was disinterested, but because he felt that his state action was sufficient (380 U.S. at 326-329). In her amended claim in the present action, appellant makes the same assertion. Her counsel believed that the state court had jurisdiction. The Supreme Court also said that the defendant could not have relied upon the policy of repose embodied in the statute, because it was aware that plaintiff was actively pursuing his FELA remedy. (*Id.* at 430.) These arguments, we think, are equally applicable here.

To all of this, the appellees' answer is technical. It points out that the state and federal courts have concurrent jurisdiction in FELA cases (45 U.S.C. § 56), while jurisdiction of the federal courts under the Death

on the High Seas Act is exclusive. See *Higa v. Trans-ocean Airlines,* 9 Cir., 1955, 230 F.2d 780; *Trihey v. Trans-ocean Airlines,* 9 Cir., 1958, 255 F.2d 824. Appellees then point to certain language in the *Burnett* opinion which appears to limit the holding to cases where the court in which the first action was filed had jurisdiction. Thus the court referred to "process . . . adequate to bring in the parties and to start the case on a course . . . which may lead to final judgment" (380 U.S. at 426), to "action in a state court of competent jurisdiction" (*id.* at 428, 429, 432, 434), to the fact that improper venue under Ohio law could be waived (*id.* at 429), and to other cases involving improper venue (*id.* at 430 *ff*).

"Jurisdiction," however, is a word of many meanings. Under the California Constitution, the Superior Court is the trial court of general rather than limited jurisdiction. (Cal. Const., Art. 6, § 5 as amended November 6, 1928; *American Radio Assn., AFL-CIO v. Superior Court,* 1965, 237 Cal.App.2d 891, 47 Cal. Rptr. 419). Its jurisdiction is therefore presumed. (*Chaney v. Trauzettel,* 1937, 9 Cal.2d 158, 69 P.2d 832; *Johnson v. Canty,* 1912, 162 Cal. 391, 123 P.2d 263; *Parsons v. Weis,* 1904, 144 Cal. 410, 77 Pac. 1007; *Galpin v. Page,* 1873, 85 U.S. (18 Wall.) 350.) Here it is clear, and is not disputed, that the Superior Court had jurisdiction of the parties; its process was adequate to bring them in. Both sides appeared in the action. Besides, such jurisdiction is also presumed. See *Sharp v. Daugney,* 1867, 22 Cal. 505. The Superior Court also had jurisdiction of the subject matter in a broad sense, *i.e.,* of an action in tort, See *Loranger v. Nadeau,* 1932, 215 Cal. 362, 10 P.2d 63. It also had

jurisdiction of the subject matter in a more limited sense, *i.e.*, of an action for wrongful death. (Cal. Code Civ. P. § 377). And if the death had arisen from a maritime tort occurring within the territorial waters of California, the Superior Court would still have jurisdiction. The Death on the High Seas Act expressly preserves that jurisdiction, 46 U.S.C. § 767; *The Tungus v. Skovgaard,* 1959, 358 U.S. 588, 593; *Curry v. Fred Olsen Line,* 9 Cir., 1966, 367 F.2d 921, 923 and cases there cited in notes 6 and 8. It is only the fact that death was caused on the high seas that deprives the court of "jurisdiction." The complaint in the state case says that the accident occurred "approximately ten (10) miles off the eastern end of Santa Catalina Island." If this allegation is correct, the death was caused on the high seas. But this allegation could have been controverted, and it would then have been a question of fact, for the state court to determine, as to where the accident did occur. Here, appellees did not deny the allegation, thus admitting it. But this admission did not deprive the court of jurisdiction. It was still necessary that appellees assert lack of jurisdiction, and it was still for the court to decide whether it had jurisdiction; to that extent, it had "jurisdiction." See *In Re Tassey,* 1927, 81 Cal.App. 287, 253 Pac. 948; *United States v. Price-McNemar Const. Co.,* 9 Cir., 1963, 320 F.2d 663, 664.

Here, then, we have a case in which the California court did have power to act, in the sense, first, that appellant could file her complaint in that court, second, that the court could bring the parties before it, and third, it could continue to act, as a court of general jurisdiction, until it was asserted that it lacked juris-

diction and it determined that the assertion was correct. The burden of asserting lack of jurisdiction was on appellees. Yet they never made the assertion. Meanwhile, the claim certainly had not been allowed to slumber until evidence had been lost, memories had faded, and witnesses had disappeared. On the contrary, appellant had been pressing her suit, discovery had been had, pre-trial had been completed, and the case had been set for trial. We think that the California action accomplished the purposes referred to in the *Burnett* case, and that the statute of limitations was tolled. *Cf. United States v. Price-McNemar Const. Co., supra; United States v. Woodbury,* 9 Cir., 1966, 359 F.2d 370, 375.

Reversed and remanded.

## APPENDIX B.

### Judgment of Dismissal.

United States District Court, for the Southern District of California, Central Division.

In the Matter of the Petition of Pacific Sportfishing, Inc., A. O. Leavitt and F. E. McEwen, as sole owners of the boat "FISHERMEN," No. 237086, Petitioners. In Admiralty. No. 64-968-EC.

Petitioners Pacific Sportfishing, Inc., A. O. Leavitt and R. E. McEwen having heretofore moved for dismissal of the Amended Claim of June E. Berry for Wrongful death of John H. Berry, and said motion having been granted on the 24th day of August, 1965, and entered on the 25th day of August, 1965;

The aforesaid Amended Claim of June E. Berry for Wrongful Death of John H. Berry is hereby dismissed and judgment of dismissal of said claim is ordered entered, on the grounds said claim is barred by the statute of limitations.

Dated: This 9th day of September, 1965.

E. Avery Crary
Judge, United States District Court.

The Foregoing Judgment of Dismissal Is Approved as to Form: George E. Shibley and Margolis and McTernan. By Ben Margolis. BEN MARGOLIS. Proctors for Claimant June E. Berry. Overton, Lyman & Prince. By /s/ Jerome O. Hughey, Proctors for Petitioners.

## APPENDIX C.

### Constitutional Provisions and Statutes Involved.

The boundary of the State of California shall be as follows: Commencing at the point of intersection of the forty-second degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred and twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line, in a southeasterly direction, to the River Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river to the boundary line between the United States and Mexico, as established by the treaty of May 30, 1848; thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, including all the islands, harbors, and bays along and adjacent to the coast.

*California Constitution,* Article XXI, § 1.

1. Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the

decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

2. The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

3. Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

4. Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

5. If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may

be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

6. In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

7. The provisions of any State statute giving or regulating rights of the action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

*Death on the High Seas Act*, 46 U.S. Code, §§761-767, 41 Stat. 537 (1920).

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

28 U.S. Code § 1333, 63 Stat. 101 (1949).

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S. Code §1406(a), 62 Stat. 937 (1948).

When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his death, his personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

*California Code of Civil Procedure*, §377.

Except as otherwise provided in Section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other

than the court designated as the proper court for the trial thereof, under the provisions of this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files with the clerk, or with the judge if there be no clerk, an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service, upon the adverse party, of a copy of such papers. Upon the hearing of such motion the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the same transferred to the proper court; provided, however, that the court in an action for divorce or separate maintenance, may, prior to the determination of such motion, consider and determine motions for allowance of temporary alimony, support of children, counsel fees and costs, and make all necessary and proper orders in connection therewith; provided further, that in any case, if an answer be filed, the court may consider opposition to the motions, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted.

*California Code of Civil Procedure*, § 396b.

If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

*California Code of Civil Procedure*, § 434.